IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

LEWTON V. LEWTON

DIANNA DIVINGNZZO LEWTON, APPELLANT,
V.
WILLIAM DUANE LEWTON, APPELLEE.

Filed April 6, 2010. No. A-09-622.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Kelly T. Shattuck, of Vacanti Shattuck, for appellant.

C.G. Jolly, of Forsberg & Jolly Law, P.C., L.L.O., for appellee.

MOORE and CARLSON, Judges.

MOORE, Judge.

INTRODUCTION

Dianna Divingnzzo Lewton appeals from an order of modification entered by the district court for Sarpy County, which made adjustments to the parenting plan with respect to certain decisionmaking authority between the parties relative to their minor child and modified the telephone visitation of William Duane Lewton. Because we find no abuse of discretion by the district court, we affirm the order of modification.

BACKGROUND

The parties' marriage was dissolved and a decree of dissolution was entered on May 21, 2004. Dianna was awarded custody of their daughter, Ellena, born in September 2003, subject to William's right of specified visitation. The visitation started as supervised, with a graduated series of visitations designed to establish a close relationship between William and Ellena, culminating in unsupervised visitation. The decree also provided that William have reasonable telephone visitation with Ellena.

The transcript reveals that an order was entered on June 26, 2007, on William's motion for specific visitation. The order notes that a guardian ad litem had been appointed for the child. The court found that a temporary visitation program varying from the prior decree was necessary given the circumstances of the parties. The court noted that the parties were extremely hostile toward one another, therefore making William's visitation sessions, which had been supervised by Dianna or her family members in her home, tense and unproductive. The court then ordered, pending further recommendations by the guardian ad litem, that William have weekly visitation to be supervised by an independent third party. The court ordered the parties to make no disparaging remarks about each other to the minor child and ensure that no other individuals make disparaging remarks about the other to the minor child.

On October 21, 2008, an order of modification was entered, approving an agreement between the parties regarding William's complaint for modification and Dianna's cross-complaint. The order, in pertinent part, awarded the parties joint legal custody of the minor child, with Dianna having primary possession during the school year subject to William's rights to reasonable visitation. During the school year, William's visitation was every other week, from Thursday after school until Monday morning. On the alternating week, William had overnight visitation on Thursday evening until Friday morning. During the summer, the parties alternated weekly possession of the child, with each party having the right to a 2-week period of uninterrupted visitation. The order also included a holiday visitation schedule as provided for in *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987). The order included a provision regarding decisionmaking, which specified that both parties shall consult each other on major issues and attempt to reach an agreement. If the parties are at an impasse, Dianna will have the final say on all issues involving religion, education, and discipline, with William having the final say on all issues involving medical care, sports, and arts. The order provided that each party shall make arrangements for daycare and before and after school care for their own time with the minor child and solely pay for the costs; however, the order provided that Dianna's parents may provide daycare at no cost to Dianna and that if William chooses to utilize Dianna's parents for daycare, it will also be at no cost to William.

On December 4, 2008, only 6 weeks after the foregoing order of modification was entered, Dianna filed a complaint for modification and for leave to remove the minor child from Nebraska, alleging that her employment with the Department of Defense was scheduled to terminate as part of a reduction in force and that she was unable to secure employment in Nebraska. In the complaint, she was seeking permission to accept a position "within reasonable driving distance from Omaha" and to permanently remove the minor child to that location. William filed an answer, counterclaim, and complaint for contempt. William denied the allegations in Dianna's complaint and alleged that Dianna's complaint included allegations that were within her contemplation at the time the previous order of modification was entered, that any alleged change in circumstances is due to Dianna's own intentional acts to create a removal action, and that Dianna's complaint was filed to harass and frustrate William and should be dismissed. In his counterclaim, William alleged that a material change of circumstances had occurred since the previous order which warranted a change in custody and a finding of contempt against Dianna. William alleged various events, including Dianna's denial of telephone visitation, actions to alienate the minor child from William, interference with William's power of

medical decisions, and creation of a "removal" situation in an attempt to terminate contact between the minor child and William. William sought custody of the minor child, subject to Dianna's reasonable parenting time; appointment of a psychologist or custody evaluator; child support pursuant to the child support guidelines; fees and costs; and "for such other and further relief the Court deems just."

Trial was set for April 29, 2009. Prior to the commencement of trial, a discussion was held on the record between the court and counsel which indicated that Dianna was dismissing her complaint to modify the decree and that William's counsel received a faxed copy of Dianna's motion to dismiss at 5:15 p.m. the preceding day. The trial court sustained the motion to dismiss, and Dianna's complaint to modify was dismissed. Trial proceeded on April 29 and May 15 on William's counterclaim to modify and for contempt. During trial, the issues relating to the contempt motion were resolved and this portion of William's motion was dismissed. A substantial record was developed at trial. Both parties testified, together with Marilyn Divingnzzo (Marilyn), Dianna's mother; William's fiance; Ellena's kindergarten teacher; Ellena's psychologist; and another psychologist who performed a custody evaluation relating to Dianna's removal request. In addition, numerous exhibits were received in evidence, including a deposition of Ellena's physician. A good deal of the evidence adduced related to William's request for modification of custody, and since William has not cross-appealed that issue, we need not discuss all of the evidence, but only that evidence relevant to Dianna's appeal. Further recitation of the facts will be discussed in the analysis section below.

On May 21, 2009, the district court entered a nine-page order, which contained detailed findings of fact, denying William's request for modification of custody, but modifying the previous order in certain respects. As related to the issues before us, the order found that Dianna and her mother have continued to engage in behaviors which tend to disparage William and encourage Ellena to make negative remarks about her time with William. The court found the evidence to show that William and Ellena enjoy the parenting time William has with Ellena and that a loving, affectionate relationship has been established and has grown since the last order of modification was entered. The court noted the evidence demonstrated, through Ellena's psychologist, that Ellena feels intense pressure not to speak of her father approvingly in front of her mother and grandparents. Based on the testimony, the court found it apparent that Ellena perceives herself to be squarely in the middle of a tug-of-war wherein she has developed strategies to try to keep both parents (and perhaps her therapist) happy. The court also found it apparent that this situation has placed significant stress on Ellena. The court noted the difficulty William was having in exercising telephone visitation during days in which he does not have parenting time. The court stated that "[t]o [William's] credit, after having been effectively removed from Ellena's life for approximately two years (through both his choice and the actions of [Dianna] and her family), he has steadfastly worked to establish a loving relationship with his daughter." The court found that the establishment of this relationship has been beneficial. The court concluded, however, that "despite the evidence regarding the immature and unjustifiable behavior of [Dianna] and her mother," the totality of the evidence did not support a change of custody.

The court went on to discuss the issues of parenting time, child support, and parenting provisions, including daycare and decisionmaking authority. With regard to parenting time, the

court noted Dianna's request that some of William's overnight visitation be eliminated. The court found that there was no complaint to modify by Dianna on file upon which the court could base such a change. The court found, however, that even if such a request was properly before the court, no change in the parenting schedule contained in the last order of modification should be made. With regard to child support, the court found that since there was no change in custody or parenting time, the issue of child support was moot, and that support remained as previously set.

With regard to other parenting provisions, the court noted that William's counterclaim included a prayer for "such other and further relief the Court deems just." The court stated its belief that some adjustments to the parenting plan were necessary based on the evidence. The court found that substantial changes in circumstances have been demonstrated which required alterations to the parenting plan. The court modified the provisions regarding daycare to give William sole authority to make arrangements for work-related childcare for Ellena, as well as before and after school care, and held that the parties were to evenly divide the cost of work-related childcare expenses. The court included the previous provision that should William choose to allow Dianna's parents to provide childcare, that it be at no expense to William. The court ordered that childcare be provided by a licensed childcare provider unless provided by a family member of the parties. The court modified the provisions regarding decisionmaking to provide that Dianna has final say on medical care, but William has final say on all issues involving mental health care (including psychiatric, psychological, and other mental health services). Finally, the court included a provision regarding telephone visitation. The court noted that the previous order of modification made no change in the original decree regarding telephone visitation. The court found that Ellena should have the ability to have daily contact with each of her parents. The court ordered that on any day in which a parent has no personal contact with Ellena during the 24-hour calendar day, said parent shall have, at a minimum, 10 minutes of telephone visitation with Ellena. The court included additional directives regarding compliance with the telephone visitation.

Dianna now appeals.

ASSIGNMENTS OF ERROR

Dianna asserts that the district court erred in (1) granting William final determination regarding daycare, (2) granting William final determination regarding mental health care, (3) expanding William's telephone visitation, (4) denying Dianna's request for an adjustment to the visitation schedule, and (5) determining that the issue of child support is moot.

STANDARD OF REVIEW

Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009).

ANALYSIS

Daycare.

Dianna assigns error to the modification made by the district court which gave William sole authority to make arrangements for childcare. Previously, each party had this authority for the time the child was in their care. The evidence suggests that both parties utilized the maternal grandmother, Marilyn, for childcare, although there was no requirement that they do so. The district court found that Marilyn has engaged in behaviors which tend to disparage William. Upon our de novo review, we agree and find that there was evidence to support finding a material change of circumstances and awarding William sole authority to make childcare arrangements, which may, but are not required, to include Marilyn.

The record shows that since the last modification order, there was an incident when William was returning Ellena to Marilyn's home and Ellena was clinging to William and asking to spend more time with him. Marilyn grabbed Ellena, told Ellena to stop playing "his games," and shut the door in William's face. Marilyn's testimony revealed that she dislikes William and does not believe that he is a good father. Marilyn testified that she records events in a book which show that William is not a good father, which Marilyn indicated was Ellena's idea. William testified that Ellena has told him that Marilyn and Dianna have told Ellena not to love William.

While it is often helpful for all concerned to be able to use grandparents for childcare, it is clear that this arrangement has caused difficulty, which difficulty has negatively impacted Ellena. Under the circumstances of this case, we find no abuse of discretion in the court's award of sole authority for childcare arrangements to William.

Authority for Mental Health Care Decisions.

Dianna assigns as error that the district court gave William final say on all issues involving Ellena's mental health care. The district court modified the previous order by changing the final say on medical issues from William to Dianna, which of course, Dianna does not take issue with. She argues, however, that it would be more appropriate for the same parent, namely her, to have final say on both the medical and mental health issues. There is evidence to support the district court's decision in both areas. As noted by the district court, the evidence demonstrates that Dianna has continued to "take the lead" in taking Ellena to doctor's appointment and administering medication. And, there is evidence that William has been reluctant to accept the diagnosis that Ellena has asthma and allergies and that the presence of a dog and secondhand smoke at William's residence could exacerbate Ellena's symptoms. With regard to mental health issues, the record shows that William has been the parent to take Ellena to weekly appointments with Ellena's psychologist, that Dianna refused to take Ellena to an appointment when Ellena was in her care, and that Dianna has not been involved in the therapy between Ellena and her psychologist.

We find no abuse of discretion in the district court's modification of the "final say" provision concerning medical and mental health care. This assignment of error is without merit.

Telephone Visitation.

The district court, in its order of modification, gives both parents the ability to have daily telephone contact on days when a parent has no personal contact with the child. In her

suggestions to the court, Dianna requested that she be able to have telephone contact with Ellena at any time during her visitation time with William. However, Dianna argues that William should not have this same right.

The record shows that William has had difficulty with his telephone visitation, which according to the original decree, was to be reasonable visitation. Apparently, the parties had agreed to William's having telephone contact with Ellena twice a week. However, since the entry of the last modification order, when William calls Dianna's house to speak to Ellena, there frequently is no answer. William occasionally gets a call back and is allowed to speak to Ellena. Ellena expressed sadness during therapy with her psychologist that she was not able to talk to her father on the telephone. In addition, Ellena's psychologist testified that Ellena is discouraged by Dianna from talking about William in a positive light. William believes that this makes it difficult for Ellena to talk to him on the telephone when Dianna is present and that as a result, Ellena has become less responsive during telephone calls with William.

Best interests of a child are the primary and paramount considerations in determining and modifying visitation rights. *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004). Our de novo review leads us to conclude that the district court did not abuse its discretion in its order regarding telephone visitation.

Adjustment to Visitation Schedule.

Dianna assigns error to the district court's failure to adjust William's visitation schedule. Specifically, Dianna argues that the Thursday and Sunday overnight visitations should be eliminated. The district court first found that there was no complaint to modify on file upon which the court could award such relief to Dianna. Alternatively, the court found that no changes in the parenting schedule contained in the last order of modification dated October 21, 2008, should be made.

The primary basis for Dianna's argument in support of eliminating the Thursday and Sunday night overnight visits is that Ellena is too tired for school the next day and does not adequately perform at school. The testimony of Ellena's kindergarten teacher does not bear this out. She had no documentation or recollection that Ellena was more tired on Fridays and Mondays than any other day. Ellena's teacher testified that Ellena is a joy to have in class, is a high achiever, and always has her work done on time. A party seeking to modify visitation has the burden to show a material change of circumstances affecting the best interests of the child. *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997). Based upon our de novo review, the district court did not abuse its discretion in failing to find that a material change of circumstances has occurred since October 2008 concerning William's visitation. To the contrary, the record reveals that William and Ellena's relationship has continued to grow in a very positive way and that Ellena enjoys the time she spends with her father. Visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor child. *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001).

This assignment of error is without merit.

Child Support.

Dianna assigns error to the district court's failure to determine the issue of child support. The court found that since there is no change in custody or parenting time, the issue of child

support is moot and would remain as previously set. Dianna dismissed her complaint to modify, and the matter was tried only on William's counterclaim which sought an award to him of custody as well as child support from Dianna. Whether child support should be modified in the event that custody was retained by Dianna was not raised as an issue during the trial.

Even if the issue of William's child support obligation was before the court, there was no error in the court's determination that child support should remain as previously set. A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

At the time of the original decree, William's child support was set, using the basic custody calculation worksheet, at $543.55 per month, based upon William's gross monthly income of $3,325.82 and Dianna's gross monthly income of $2,433. The order of modification entered on October 21, 2008, modified William's child support to $150 per month pursuant to a joint custody calculation worksheet, which the order indicates was attached. However, the transcript before us does not include this worksheet. The child support worksheet that Dianna offered at the instant trial as an aid to the court showed William's net monthly income at $3,333.33 and hers at $3,458.33, which resulted in a monthly child support obligation for William of $554.29. This worksheet was the basic custody calculation worksheet, not the joint custody calculation worksheet. Dianna has failed to adduce evidence to show that a modification of child support is warranted, particularly given that the court did not modify the joint custody and parenting time arrangement contained in the previous order.

This assignment of error is without merit.

CONCLUSION

Having found no abuse of discretion in the district court's order of modification, we affirm.

AFFIRMED.

CASSEL, Judge, participating on briefs.